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No. 86-895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN LYLE HALL,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner has presented a question worthy of review by this Court when: (1) he waived the right to review on this issue by not properly raising it at trial; and (2) two cases pending before this Court present the same issue.

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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The respondent asks this Court to deny the petition for writ of certiorari to review the decision of the Appellate Court of Illinois, Second District, because petitioner has not presented a question worthy of review by this Court.

OPINION BELOW

The petitioner seeks review from an Illinois Appellate Court, Second District, opinion in *People v. Hall*, No. 2-85-231 (2nd Dist. 1986). A copy of the opinion is included

with the petition as Appendix A. The petition for rehearing by that court was denied on May 5, 1986, and petitioner's leave to appeal to the Illinois Supreme Court was denied on October 2, 1986 (see Appendices B and C to the petition).

JURISDICTION

The petition for certiorari sets forth the jurisdictional requisites, at page 1 of the petition. However, for the reasons set forth in the following argument petitioner has failed to demonstrate why this Court should exercise its judicial discretion and grant the petition for writ of certiorari.

STATEMENT OF FACTS

In addition to those facts set forth in the Statement Of The Case in the petition for a writ of certiorari at pages 2-4, the respondents note the following fact. In deciding the direct appeal from petitioner's conviction for obscenity, the Illinois Appellate Court, Second District, held as follows:

> Defendant also argues that this court should declare the Illinois obscenity statute unconstitutional and in need of legislative revamping because there still remain unanswered questions regarding its construction. First, defendant mentions that no Illinois court has ever ruled on whether the third element of the test for obscenity, *i.e.*, whether the work is "utterly without redeeming social value," should be adjudged on an objective basis or by an application

of Statewide community standards. However, as the State correctly points out in its brief, defendant never specifically explains how this issue arises in the instant case. Defendant never argued below that an objective standard should be applied in adjudging whether the magazine in question was "utterly without redeeming social value." Rather, defendant himself stressed the application of a Statewide community standard when he tendered his IPI instruction defining obscenity, an instruction which he had modified to specifically instruct the jury that it was to apply a community standard.

Appendix to the Petition, App. 20.

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE PETITIONER HAS NOT PRESENTED A QUESTION WORTHY OF REVIEW BY THIS COURT

A. Petitioner Has Waived The Right To Review On This Issue By Not Raising It At Trial.

There is no indication from either the petition or from the Illinois Appellate Court opinion that petitioner ever tendered a jury instruction requiring the third part of the Illinois obscenity statute to be adjudged by an objective standard. As petitioner concedes, he only tendered jury instructions which applied community standards to the Illinois obscenity statute, which are the same standards he now argues against. Further, there is no indication from the petition or from the Illinois Appellate Court opinion that petitioner objected to the community standards instruction at the jury instruction conference.

The Illinois Appellate Court chose not to address the issue, stating,

> Defendant also argues that this court should declare the Illinois obscenity statute unconstitutional and in need of legislative revamping because there still remain unanswered questions regarding its construction. First, defendant mentions that no Illinois court has ever ruled on whether the third element of the test for obscenity, *i.e.*, whether the work is "utterly without redeeming social value," should be adjudged on an objective basis or by an application of Statewide community standards. However, as the State correctly points out in its brief, defendant never specifically explains how this issue arises in the instant case. Defendant never argued below that an objective standard should be applied in adjudging whether the magazine in question was "utterly without redeeming social value." Rather, defendant himself stressed the application of a Statewide community standard when he tendered his IPI instruction defining obscenity, an instruction which he had modified to specifically instruct the jury that it was to apply a community standard.
>
> Appendix to the Petition, App. 20.

Illinois law is clear on this issue. Failure to object to jury instructions at the time of trial waives the question. *People v. Tannenbaum*, 82 Ill.2d 177, 180, 415 N.E.2d 1027, 1029 (1980), *People v. Roberts*, 75 Ill.2d 1, 10, 387 N.E.2d 331, 335 (1979). Further, on appeal, one cannot raise as error the failure of the court to give a certain jury instruction unless he tendered it at trial. *People v. Tannenbaum*, 82 Ill.2d 177, 180, 415 N.E.2d 1027, 1029 (1980), *People v. Underwood*, 72 Ill.2d 124, 129, 378 N.E.2d 513, 515 (1978).

The purpose of the waiver rule is so that errors can be corrected at trial before the instructions are given and

so that the party failing to object does not gain an advantage of obtaining a reversal due to his own failure to object. *People v. Roberts*, 75 Ill.2d 1, 11, 387 N.E.2d 331, 336 (1979).

In summary, defendant waived this issue by not objecting at trial to the instruction given and by not tendering the instruction he now claims should have been given. Further, he actually stressed the application of the community standard by tendering instructions with that standard.

B. This Court Already Has Two Cases Pending Before It Which Present The Same Issue.

This case presents an unnecessary burden on the Court to review an issue which is currently before this Court. This Court granted certiorari in the consolidated case of *Pope v. Illinois*, ____ U.S. ____, 107 S.Ct. 61 (1986) involving the same issue as Petitioner brings before this Court in the present case.

In both cases consolidated in *Pope* and in the present case, an employee of an adult bookstore was convicted of the offense of obscenity. The constitutional issue before the Court in both *Pope* and the instant case is the same: whether the third prong of the obscenity test set out in *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973) should be adjudged on a community standard or on an objective standard.

Since this issue is already properly before this Court there is no need to review it again in a case wherein doubt exists as to whether this constitutional claim has properly been preserved for review (see Argument A, *supra*).

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition because the issue it presents is not worthy of review by this Court.

Respectfully submitted,

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